FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 11 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 831

RUDOLPH EULE,

Petitioner,

vs.

MARY ELLEN EULE,

Respondent.

BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

JOHN A. WITTIG
URBAN R. WITTIG
LAWRENCE M. WITTIG
EDMUND J. KRAWCZYK,
Of Counsel
135 West Wells Street
Milwaukee 3, Wisconsin
Attorneys for Respondent.

ANDERSMITH-OORTMEYER CO.
MILWAUKEE

INDEX

Page

BRIEF

Questions Presented 1

Statutes Involved 3

Statement of Case in Opposition 3

Argument 7

Conclusion 22

APPENDICES

I. Judgment Terminating Parental Rights of Petitioner 24

J. Findings of Fact and Conclusions of Law in Termination of Parental Rights Proceeding 25

CITATIONS

Cases Cited

Armstrong v. Armstrong, 350 U.S. 568 ..... 12, 13

Bobowski v. Bobowski, 242 Ill. 524, 90 N.E. 36 21

Callon v. Callon, 5 Ill. App. 2nd 480, 125 N.E. 2nd 854 22

Coe v. Coe, 334 U.S. 378 14

Craig v. Craig, 163 Ill. 176, 45 N.E. 153 21

Davis v. Davis, 259 W. 1 10

Davis v. Davis, 305 U.S. 32 14

Esenwein v. Penn, 325 U.S. 279 9

Page

Estin v. Estin, 334 U.S. 541 11

Great Western Telephone v. Burnham, 162 U.S. 339, p. 345 8

Griffin v. Griffin, 327 U.S. 220 ..... 10, 18

Horn v. Horn, 5 Ill. App. 2nd 346, 125 N.E. 2nd 539 22

Ische v. Ische, 252 Wis. 250 20

Karr v. Rust, 217 Ill. 555 22

Maginnis v. Maginnis, 323 Ill. 113, 153 N.E. 654 21

May v. Anderson, 345 U.S. 528 ..... 11, 12, 14

New York ex rel Halvey v. Halvey, 330 U.S. 610 20

North Carolina v. Williams, 317 U.S. 258 and 325 U.S. 226 14

Nye v. Nye, 411 Ill. 408, 105 N.E. 2nd 300 22

Pennoyer v. Neff, 95 U.S. 714 10

Pollock v. Pollock, 273 Wis. 233 19

Setzer v. Setzer, 251 Wis. 234 20

Sherrer v. Sherrer, 334 U.S. 343 14

Statutes Cited

Smith-Hurd Illinois Annotated
Chapter 110

Sec. 20 (3) 16

Sec. 48 (1) 16

Page

Chapter 40

Sec. 19 21

28 U. S. C. 1257 ..... 1, 3, 7

Wisconsin Statutes

Sec. 48.13 (Vol. 1) 3, 9

Texts Cited

17 Am. Jur. Sec. 994; Pp. 176, 177 13

39 Amer. Jur. 617 (Sec. 27) 8

160 A.L.R. 403 10

28 A.L.R. 2nd P. 1390 10

Robertson and Kirkham Jurisdiction of Supreme Court of U.S., Sec. 35 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 831

RUDOLPH EULE,

Petitioner,

vs.

MARY ELLEN EULE,

Respondent.

BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

I. QUESTIONS PRESENTED

A. JURISDICTIONAL QUESTIONS

1. Is the order of the Wisconsin Supreme Court, sought here to be reviewed, a "final judgment" within the purview of *28 U.S.C. 1257?*

2. Is the relief sought by the petitioner herein susceptible of protection by judicial action in this proceeding?

B. SUBSTANTIVE QUESTIONS

3. May full faith and credit be given by a Wisconsin court to an Illinois judgment with respect to the matters of alimony, custody and support money (a) where it is stipulated between counsel in the Wisconsin action that the Illinois court had no jurisdiction over the person of the wife and child of the parties, both of whom were bona-fide residents of Wisconsin; and (b) where the Illinois record itself demonstrates that it had no personal jurisdiction over the respondent or child?

4. Does a Wisconsin court, which has personal jurisdiction over husband and wife, have jurisdiction to decide questions of alimony, support money, custody and suit fees, even though there may have been a valid divorce as to the status of the parties in Illinois where these issues were neither judicially determined nor determinable in the Illinois action?

5. Is a divorce judgment divisible so that a Wisconsin court may give full faith and credit to an Illinois judgment of divorce as far as the status of the parties is concerned but deny full faith and credit as to other matters relating to personal rights?

6. Is a judgment obtained in violation of procedural due process entitled to full faith and credit in another jurisdiction?

7. Is an Illinois judgment which is not final in Illinois entitled to greater effect in Wisconsin via the full faith and credit clause, than in Illinois without regard to the welfare of the child?

STATUTES INVOLVED

28 U.S.C. 1257. State Courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

WISCONSIN STATUTES, 1957

Sec. 48.13. (Vol. I) Jurisdiction over children alleged to be neglected or dependent. The juvenile court shall have *exclusive* jurisdiction over:

(1) A child who is alleged to be neglected because:

(d) He is without necessary subsistence, education or other care necessary for his health, morals or well-being because his parent, guardian or legal custodian neglects or refuses to provide it.

II. STATEMENT OF CASE

A. RE JURISDICTION

The petitioner set forth in his Answer two separate defenses, one asserting the Illinois judgment and the other asserting a defense on the merits of the case. (R-55, 59)

The instant appeal decided only the one defense, and the Wisconsin Supreme Court remanded the case for further proceedings in the trial court.

Trial on the merits of the remaining issues of custody, support and alimony and legal expenses, at the time of the petition herein, was to be had in the trial court. Various issues of fact and of law have been raised by the amended complaint and the answer thereto.

The most important issue raised by the pleadings is the fitness of both parties to have custody of the five year old daughter.

B. RE MERITS OF PETITION HEREIN

Service of process in the Illinois action was made upon respondent in the State of Wisconsin. In the Illinois action which was pending at the time of commencement of this action in Wisconsin, the respondent appeared *specially* to challenge the jurisdiction of the Illinois court. In accordance with Illinois practice respondent by her attorney moved to dismiss the Illinois action for lack of jurisdiction. This motion was denied on January 22, 1958 by the Illinois court and no further appearance was made by respondent in the Illinois action thereafter. (R-110)

After the commencement of this action in Wisconsin on March 18, 1958, the Illinois court entered two orders on March 21, 1958: one recited that the summons was served on respondent and she had *failed to answer or otherwise make an appearance herein* (R-114) and set the hearing on the complaint for the same day at 9:30 A.M. The other Illinois order of March 21, 1958 granted leave instanter to petitioner to amend his complaint *on its face* by adding the following words and paragraph to his prayer for relief therein, namely: "That the sole care, custody, education and control of the minor child of the parties herein, Debra Lee Eule, be granted to the plain-

tiff, Rudolph Eule, and for such other and further relief as to the court may seem fit". (R-118)

This amended complaint was never served on the respondent or her counsel. The original complaint merely asked that the marriage be dissolved and be declared null and void.

Ten days later a default judgment of divorce was entered in the Illinois action which judgment also adjudicated that the petitioner herein have the custody of the minor child. The first knowledge that respondent had that plaintiff was seeking custody of the infant child was when respondent was served with a copy of the default Illinois judgment, awarding custody to petitioner herein.

Subsequently in the Wisconsin action it was stipulated by counsel herein that respondent and the minor child were never at any time within the jurisdiction of the Illinois court. (R-136)

Custody and Support of Minor Daughter.

Respondent and child left petitioner when the daughter was ten months old and the parties have been litigating ever since. Respondent has had custody of the minor daughter ever since. Petitioner has not even visited his daughter in the last three years. (R-24) It is alleged that petitioner on numerous occasions beat the infant child of the parties since she was six weeks old. (R-16) It is also alleged that petitioner was ready to sell the infant child for $5,000.00 in New York and said he would give up all rights to her (R-16); and further that petitioner has a violent temper and has struck the infant child without cause so many times that she became a nervous

wreck; and that petitioner is an unfit person to have custody of the minor child, now age five. (R-16)

The usual order for temporary alimony and support was entered on April 9, 1958 requiring petitioner to pay $20.00 per week support money for the minor child and $5.00 per week temporary alimony. (R-18,19) The petitioner has not paid 1¢ for the support of his daughter since this action was commenced in 1958. (R-148) Petitioner has paid only $16.00 for support and alimony since September 19, 1956. (R-148) Petitioner in his Answer admits that he is an able-bodied man capable of earning a salary sufficient to take care of his needs. (R-56)

On June 15, 1959 after due notice and hearing the petitioner was adjudged guilty of contempt for failure to pay temporary support and alimony and sentenced to thirty days in the Waukesha County jail. (R-154) Petitioner resides in Chicago, Illinois, and hence is beyond reach of the Wisconsin process.

C. RE: TERMINATION OF PARENTAL RIGHTS OF PETITIONER

In an independent action in the Juvenile Court of Waukesha County, Wisconsin, entitled "In the Matter of the Termination of Parental Rights to Debra Eule, a minor" the parental rights of Rudolph Eule, petitioner herein, were terminated. (App. I) This proceeding was commenced on March 25, 1959. The petitioner herein appeared specially by counsel to assert that said Juvenile Court had no jurisdiction over the subject matter. This special appearance was overruled.

The Juvenile Court entered its Findings of Fact and Conclusions of Law on July 2, 1959 (App. J) finding

among other matters that Debra Eule, a minor, had been a continuous and bona fide resident of the County of Waukesha since November 27, 1955 and that her legal settlement was in Waukesha County; that the petitioner herein repeatedly struck his daughter when she was less than one year old and that he "swore and shouted at her"; that he had failed to provide her with any money or support since March, 1957.

As a legal conclusion the court found that the petitioner herein, although financially able, had substantially and continuously over the past two years neglected to provide said minor with necessary subsistence, education, and other care necessary for her health, morals and well-being.

ARGUMENT

A. JURISDICTIONAL QUESTIONS

1. The order of the Wisconsin Supreme Court sought here to be reviewed is not a "final judgment" within the scope of *28 U.S.C. 1257.*

The petitioner has elected in his answer to the complaint to plead two defenses. One a defense on the merit and two, the defense of the prior Illinois judgment. The Wisconsin Supreme Court has only disposed of the one defense pertaining to the Illinois judgment. That court then remanded the case to the trial court for trial of the issues raised by the remaining defense pleaded by petitioner.

It is conceivable that petitioner will obtain the relief he seeks in the Wisconsin court. As stated in *Robertson and Kirkham Jurisdiction of Supreme Court of the United States, Sec. 35:* "Where the highest court of a

state decides on a first appeal a federal question against appellant and remands the case for further proceedings and on further hearing the trial court renders judgment against him, he cannot have the judgment reviewed by the Supreme Court without first *appealing from it to the highest court* of the state, even though that court declines upon a second appeal to reconsider any question of law decided upon the first appeal." *Great Western Telephone vs. Burnham*, 162 U.S. 339 at page 345.

2. The relief sought by petitioner herein is not susceptible of protection by judicial action in this proceeding.

The petitioner seeks to have enforced the Illinois default judgment awarding him custody in March of 1958.

It is elemental that the right to custody is not an absolute right. Both in Illinois and Wisconsin as well as in other states the question of custody remains open and subject to alteration or change by a court of competent jurisdiction upon a showing of a change in circumstances. During the period from the time of entry of judgment in Illinois to the time of hearing in the Juvenile Court of Waukesha County petitioner forfeited his right to custody.

Failure of a parent to provide necessaries for a child is good ground for forfeiture of his right to its custody. *39 Am. Jur. 617 (Sec. 27)* In Wisconsin, only the Juvenile Court may terminate parental rights. Since the time for appealing from the judgment of the Waukesha Juvenile Court has long since expired and since the petitioner failed to perfect an appeal therein, this court is

without jurisdiction to grant the relief requested by petitioner. *Sec. 48.13 of the Wis. Stats.* reads:

> "The Juvenile Court shall have *exclusive* jurisdiction of (1) a child who is alleged to be neglected because (d) he is without necessary subsistence, education or other care necessary for his health, morals or well-being because his parent, guardian or legal custodian neglects or refuses to provide it." (Emphasis mine)

B. SUBSTANTIVE QUESTIONS

It was stipulated to in the trial court upon the hearing of the motion for summary judgment that the respondent and the minor child "were never at any time within the jurisdiction of the Illinois court". (R-167) Neither the mother nor the child was within the state of Illinois at any time during the Illinois proceedings and the Illinois record shows that respondent was served with Illinois process in the state of Wisconsin, hence, it is obvious that the Illinois court had no jurisdiction over the person of the respondent.

Esenwein v. Penn, 325 U.S. 279:

> Headnote 4: "Where a state court has denied full faith and credit to a judgment of a sister state on evidence warranting the conclusion that it was rendered without jurisdiction, the Supreme Court will not retry the facts."

In addition, the record itself of the Illinois action demonstrates conclusively that there was a special appearance by respondent in the Illinois action, which appearance was limited to an attack upon the jurisdiction of the Illinois court and when that failed there was no further appearance or participation in the Illinois

action by the respondent. There was never any personal appearance by respondent in that action.

It has been the constitutional rule in this country since *Pennoyer v. Neff*, 95 U.S. 714 (1878), that nonresidents cannot be subjected to *personal* judgments without personal service within the state or a general appearance. *160 A.L.R. 403:* (1946 Edition) The later cases agree that custody provisions of a divorce decree are without extra-territorial effect if, either generally or with regard to the child, the court was without jurisdiction. This rule, of course, has been followed in Wisconsin in *Davis v. Davis*, 259 Wis. 1, PP. 5-6:

> "The court still holds, however, that where the defendant is not served with process in the state of the forum and takes no part whatever in the proceedings, he or she is not concluded by the judgment and the state where the parties admittedly resided up to the time of the divorce is not required to extend faith and credit to the judgment under such circumstances."

28 A. L. R. 2nd P. 1390:

> "It is now settled that a judgment for alimony, or for alimony in a divorce decree, because partaking of the nature of a judgment in personam, is invalid as violation of the due process requirements of the Federal Constitution, where it has been rendered by court having no jurisdiction over the person of the defendant." *Griffin v. Griffin* (1946) 327 U.S. 220

Both before and after the *Williams* cases cited by appellant, the courts have consistently held that a court cannot have jurisdiction to award a child's custody when the child is outside the state at the time the court enters its decree and when the court has jurisdiction neither of the child's person nor of the person of the parent

who has the child with him outside of the state. That position was reaffirmed by the U.S. Supreme Court in *May v. Anderson*, 345 U.S. 528 (1952). (This case involved a divorce decree granted by the Circuit Court of Waukesha County, Wisconsin.) In fact, the United States Supreme Court went a step further:

Headnote 6:

> "In the absence of personal jurisdiction over the wife, a decree awarding the custody of children to the husband obtained by him in an ex parte divorce proceeding is not entitled to full faith and credit, *even though at the time the decree was made the children were domiciled in the state in which it was entered.*" (Emphasis mine)

May case, P. 533:

> "Separated as our issue is from that of the future interests of the children, we have before us the elemental question whether a court of a state where a mother is neither domiciled, resident, nor present may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody." (Emphasis mine)
>
> "It is now too well settled to be open to further dispute that the 'full faith and credit' clause and the Act of Congress passed pursuant to it do not entitle a judgment in personam to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

May case, PP. 533 and 534:

> "In Estin v. Estin, 334 U.S. 541, this court upheld the validity of a Nevada divorce obtained ex parte

by a husband resident in Nevada *insofar as it dissolved the bonds of matrimony*. At the same time we held Nevada powerless to cut off in that proceeding a spouse's right to financial support under the prior decree of another state. In the instant case, we recognize that *a mother's right to custody of her children is a personal right* entitled to at least as much protection as her right of alimony." (Emphasis mine)

The *May* case is cited with approval in *Armstrong v. Armstrong*, 350 U.S. 568:

Headnote 1: "A state court in awarding alimony to a wife whose husband has obtained a valid ex parte divorce decree in a sister state does not fail to give full faith and credit to the decree of the sister state where that decree refuses to pass on the question of alimony and does not purport to adjudicate the non-resident wife's right thereto."

Headnote 6: "A decree denying alimony to a non-resident wife in divorce proceedings in which she has not been personally served with process in the state and has not appeared as a party, is not entitled to full faith and credit."

In the *Armstrong* case at P. 576:

"* * * We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. Our view is based on the *absence of power* in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a non-resident of Florida, had not been personally served with process in that state, and had not appeared as a party.

* * * We held in Estin v. Estin (supra) that an alimony judgment was this kind of 'personal judgment'."

Armstrong case, P. 569:

"The sole question presented by the petition for certiorari was whether the Ohio courts were required to give full faith and credit to the ex parte Florida divorce decree * * * The Ohio courts, therefore, in awarding alimony to the wife, did not in fact fail to give full faith and credit to the Florida decree."

The appellant cites *17 Am. Jur. Sec. 994, p. 176.* We cite from the same section:

"If the divorce court did not have jurisdiction, either generally or with respect to custody, the provisions of the divorce decree with respect to custody need not be given effect in any other jurisdiction * * * "

Page 177:

"Even though the divorce state deems that it has jurisdiction to award custody upon constructive service where the child has a technical domicil within the state but is absent when the action is begun, a decree thus obtained is not necessarily entitled to full faith and credit. Thus where a nonresident parent has custody of a child in another state after a separation of the spouses, and has a right to custody, this is a personal right which cannot be terminated without jurisdiction over such parent in personam; the divorce court, in a state in which he or she is not domiciled, cannot gain jurisdiction to terminate that right by constructive service. It is similarly held that if the child resides with a third person in one state and the mother obtains a divorce in another state, an award of custody upon constructive service will be *deemed void* in the jurisdiction in which the child resides.

> Assuming that an order changing custody is valid within the state where entered on constructive service, it not entitled to full faith and credit where the custodian has a domicil outside of the state and the child live at such domicil." (Emphasis mine)

Appellant alleges nothing in his brief to rebut the holding in the *May v. Anderson*, 345 U.S. 528 case, that a custody award obtained in an ex parte divorce is not entitled to full faith and credit.

Appellant in his brief relies upon the following United States cases:

Davis v. Davis, 305 U.S. 32;

North Carolina v. Williams, 317 U.S. 258; and 325 U.S. 226;

Sherrer v. Sherrer, 334 U.S. 343;

Coe v. Coe, 334 U.S. 378

We would distinguish the instant case from those above on the facts.

Davis case. Here there was a decree of separation in Washington, D.C. The husband thereafter brought action in Virginia for divorce and made a full disclosure of the separation decree. Wife was served in the District of Columbia and entered what she labeled a "special appearance" which was overruled. The Supreme Court found that the so-called special appearance was in fact a general appearance stating at P. 43:

> "Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. Considered in its entirety the record shows that she submitted herself to the jurisdiction of the Virginia Court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

Williams cases. These cases concern themselves with the question of domicile of the plaintiff in commencing a divorce action. Since we are not challenging the domicile or residence of the husband in the Illinois action, the question is mute.

Sherrer case. Here the wife left Massachusetts and went to Florida and commenced a divorce action there. The husband appeared generally and in person and participated in the trial of the case in Florida. Later the husband attacked the Florida judgment in a Massachusetts court and the Supreme Court held that where the defendant appeared and participated in the original action he is barred from attacking its judgment in a sister state.

Coe case. The husband left Massachusetts and went to Nevada where he commenced a divorce action with servvice on the wife in Massachusetts. The wife went to Nevada and through attorneys filed an answer to the complaint together with a cross complaint for divorce. Both husband and wife appeared in person and by counsel testifying in the Nevada court.

It is obvious that where a party submits himself to the jurisdiction of the court by way of a general appearance or an answer or participation in the trial on the merits that that court has jurisdiction in personam. No such facts were present in the Illinois action commenced by appellant. On the contrary, there was no general appearance, there was no participation in the Illinois action by respondent, and the divorce decree was an ex parte decree as is evidenced by the record of the Illinois court.

In the Illinois action is an order dated March 21, 1958, for a default hearing reciting, among other things " * * *

and she (respondent) having failed to file answer *or otherwise make appearance herein*, the said defendant (respondent) is adjudged in default." (Emphasis mine)

It is significant that appellant has set forth no Illinois law on the question of special appearances. The pertinent sections are *Sections 20 and 48 of the Smith-Hurd Illinois Annotated Statutes, Chapter 110:*

> Sec. 20(3). "If the court sustains the objection (i.e. to jurisdiction) an appropriate order shall be entered. Error in ruling against the defendant on the objection is *waived* by the defendant's taking part in further proceedings in this case unless the objection is on the ground that the defendant is not amenable to process issued by a court of this state." (Emphasis mine)
>
> Sec. 48(1). Defendant may within the time for pleading file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds * * *
>
> (a) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.
>
> (c) That there is another action pending between the same parties for the same cause.

It is apparent that respondent's Illinois counsel followed the Illinois statutory procedure on special appearances and the attendant motion to dismiss.

Respondent therefore submits that the trial court gave full faith and credit to the Illinois judgment insofar as it dissolved the marriage of the parties; the trial court correctly declined to give full faith and credit to that portion of the Illinois judgment pertaining to custody, a personal

right, since the Illinois court did not have jurisdiction in personam over respondent.

It necessarily follows that the Wisconsin court, having personal jurisdiction over the appellant, has jurisdiction to determine the questions of custody, support and alimony and suit fees of respondent.

Lack of Due Process in Illinois Action.

The Illinois action was started, if at all, by service of process on July 5, 1957, by the appellant herein. Respondent entered a special appearance challenging the jurisdiction of that court and followed Illinois procedure in moving for dismissal of the action for lack of jurisdiction. This motion was heard and denied in January, 1958. Respondent made no further appearance therein. On March 21, 1958, three days after the commencement of the instant action in Wisconsin, appellant secretively and ex parte obtained an order of the Illinois court permitting him to amend his complaint instanter to seek custody. The Illinois record contains nothing by way of an attempt to serve notice of this amendment and no notice in fact was ever given to the respondent. On the same day and presumably at the same time, a second order was entered in the Illinois court adjudging respondent in default, ordering the complaint to be taken as confessed against the respondent and setting the matter for hearing at 9:30 A.M. on the same day.

Hence, we have on the same day an order reciting no appearance by the respondent by the same judge who heard and overruled respondent's motion for dismissal for lack of jurisdiction, an order permitting immediate amendment to the complaint and an order adjudging respondent in default and taking the amended complaint as

confessed against respondent, all without any notice of any kind to respondent, and all after it was known to both the court and the appellant that respondent couldn't physically be aware of the drastic change sought ex parte by appellant. So as to eliminate any implication of collusion, we direct this court's attention to the prefacing statement of the order presented to the Illinois court for signature:

> "Summons in this suit *as appears from the return of the sheriff of Cook County thereon* having been duly served upon the defendant, Mary Ellen Eule * * * "

It is obvious that the appellant herein misrepresented the fact about service to the Illinois court so as to lead that court to believe there was personal service within Illinois. In fact there was no affidavit of any kind by the Sheriff of Cook County.

We submit that the lack of notice (i.e. due process) was based upon a material misrepresentation to the court by appellant. Had the true fact of service and special appearance been presented to the court at the time the order was heard, the Illinois court undoubtedly would have required due notice to have been given to respondent before entering either order dated March 21, 1958. However, the fact remains that no notice of any kind was given to respondent who never realized that the custody of her daughter, who had been with her since birth, was being jeopardized.

Griffin v. Griffin, 327 U.S. 220

P. 228: "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction."

P. 229: "Moreover, due process requires that no other jurisdiction shall give effect even as a matter of comity to a judgment."

Such being the case, the Illinois judgment (as to custody award) is not entitled to full faith and credit in Wisconsin.

Illinois Decree Not Complete.

The Illinois judgment is silent as to alimony, support money, division of estate and suit fees.

While a court of one state may dissolve the marriage, matters such as alimony and support and division of property of the parties may properly be determined by a court in another state.

Pollock v. Pollock, 273 Wis. 233, P. 247:

"* * * Under modern decisions it is quite generally held that a divorce action is divisible and that while a court of one state may dissolve a marriage, items such as custody and alimony may be determined by a court in another state which acquires jurisdiction with respect to such matters."

Appellant argues that under the *Leach* case, the wife is not entitled to alimony as a matter of Wisconsin law. That case concerned a trial in Wisconsin of two Wisconsin residents both of whom appeared in a bitterly contested trial after which the court found the wife had left the husband without cause.

No such facts are before this court here. The fact is that the Illinois court did *not* in its decree pass upon or even mention alimony, suit money or disposition of the property of the parties. Hence, jurisdiction is open to sister states to adjudicate these questions.

Illinois Judgment is Not Final in Illinois and Hence has no Constitutional Claim to *Greater Effect in Wisconsin than in Illinois.*

The Wisconsin law as to judgments which are not final in other states has been set out in two rather recent cases:

Ische v. Ische, 252 Wis. 250 @ 262:

> "* * * (The Nevada judgment) is subject to revision and consequently is not a final decree in that state; and therefore does not deprive courts in other states of jurisdiction to change the amount or manner of such payments (alimony and support) in proper proceedings for that purpose."

Setzer v. Setzer, 251 Wis. 234 @ 236:

> "* * * a judgment has no constitutional claim to a more conclusive or final effect in the state of the forum than it has in the state where rendered, and that since a Florida decree involving custody of minor children was not a final decree in the State of Florida, the state of the forum has at least as much leeway to disregard the judgment, to qualify it or to depart from it as does the state where it was rendered * * * The matter seems so clear that a more extended discussion is not warranted."

New York ex rel Halvey v. Halvey, 330 U.S. 610 @ 614:

> "* * * But a judgment has no constitutional claim to a more conclusive or final effect in the state of the forum than it has in the state where rendered. At P. 615 * * * it is clear that the state of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered."

Under Illinois law the Illinois courts retain jurisdiction in divorce actions. *Smith-Hurd Illinois Statutes, Chapter 40, Sec. 19:*

> " * * * Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, *it may at any time afier the entry of a decree for divorce* upon obtaining jurisdiction of the person of the defendant by service of process or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as from the evidence and nature of the case shall be fit, reasonable and just. * * * The court may on application from time to time make such alterations in the allowance of alimony and maintenance and the care, custody and support of the children as shall appear reasonable and proper." (Emphasis mine)

The cases in Illinois holding that the court has the right to modify its decree with respect to alimony, support money and custody are almost limitless. We cite but a few:

Bobowski v. Bobowski, 242 Ill. 524, 90 N.E. 36:

The court retains jurisdiction at a term subsequent to the entry of a decree of divorce to alter or modify the decree for alimony.

Craig v. Craig, 163 Ill. 176, 45 N.E. 153:

The modification of alimony allowed in a divorce suit lies in the discretion of the court.

Maginnis v. Maginnis, 323 Ill. 113; 153 N.E. 654:

Power to make modifications in allowance of alimony is not exhausted by entry of original order fixing amount,

but is a continuing power to modify the decree according to the needs and circumstances of the parties.

Karr v. Rust, 217 Ill. 555:

The court retains jurisdiction in a suit for divorce at all times to enforce, adjust or modify original decree in regard to custody of children as circumstances may subsequently demand.

Callon v. Callon (1955) 5 Ill. App. 2d 480, 125 N.E. 2d 854:

Horn v. Horn (1955) 5 Ill. App. 2d 346, 125 N.E. 2d 539:

Nye v. Nye (1952) 411 Ill. 408, 105 N.E. 2d 300:

After a divorce decree the custody of the children is always subject to the order of the court which enters the decree and may be changed from time to time as the best interests of the children demand.

CONCLUSION

The Illinois court had no jurisdiction over the person of the respondent; therefore it had no authority to adjudicate personal rights.

There was a lack of due process and fraudulent misrepresentation to the Illinois court in asserting to that court that service was made by the sheriff of Cook County, implying personal jurisdiction.

The Illinois court did not adjudicate questions of alimony, disposition of property of the parties, and suit fees. It thereby left these questions open to jurisdiction elsewhere.

Even assuming, for the sake of argument, that the Illinois court had personal jurisdiction over the respondent, its decree is not final in Illinois and Wisconsin may modify it in a proper proceeding.

The appellant has entered a general appearance in the Wisconsin action and is subject to personal jurisdiction.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN A. WITTIG

Attorney for Respondent.

APPENDIX I

STATE OF WISCONSIN : JUVENILE COURT :
WAUKESHA COUNTY

In the Matter of the Termination
of Parental Rights to

DEBRA EULE, JUDGMENT

a Minor.

This matter having been brought on for hearing on the 19th day of June, 1959, at the regular term of this court before the Honorable David L. Dancey, Judge of said Court, and the court having filed its findings of fact and conclusions of law from which it satisfactorily appears and wherein the court finds that all rights of the parent, Rudolph Eule, to the minor, Debra Eule, should be terminated,

IT IS ADJUDGED AND DECREED:

That all rights of the parent, Rudolph Eule, to the above named minor, Debra Eule, be, and they hereby are, terminated.

Dated at Waukesha, Wisconsin, this 2nd day of July, 1959.

BY THE COURT:

(S) DAVID L. DANCEY

APPENDIX J

STATE OF WISCONSIN : JUVENILE COURT :
WAUKESHA COUNTY

In the Matter of the Termination
of Parental Rights to
DEBRA EULE,
a Minor.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

At a regular term of said court held at the Court House in the City of Waukesha, in said County, on the 19th day of June, 1959, during said term. Present the Honorable David L. Dancey, Juvenile Court Judge, presiding.

The above entitled action having been duly noticed for hearing and the same having come on in its regular order to be heard before the court;

And it appearing that this is an action for termination of the parental rights of Rudolph Eule, and that the notice of hearing in this action could not be personally served on him for the reason that said Rudolph Eule is not a resident of the State of Wisconsin as more fully appears by the affidavits on file herein.

And it further appearing that the petition herein was filed in the office of the Clerk of said Court on the 26th day of March, 1959.

And it further appearing that said notice of hearing was duly published in the Waukesha Daily Freeman, a newspaper likely to give notice to Rudolph Eule, once a week for three weeks and that the day of the first publication was on the 23rd day of May, 1959, and that the day of the last publication was on the 6th day of June, 1959, as appears by the affidavit of the publisher on file herein.

And the petitioner appearing in person and by Wittig and Wittig, attorneys, by John A. Wittig, and said Rudolph Eule appearing specially by Glassner, Clancy & Glassner, by William Glassner, and after hearing the testimony and proofs submitted, I, David L. Dancey, the judge before whom this matter was heard, do make these findings of fact and conclusions of law, as follows, to-wit:

FINDINGS OF FACT

1. That since November 27, 1955, Debra Eule, a minor, has been a continuous and bona fide resident of the County of Waukesha, State of Wisconsin; that said minor resides with her mother in the City of Oconomowoc, Waukesha County, Wisconsin.

2. That said Debra Eule was born on January 6, 1955, and that her mother is Mary Ellen Eule, Oconomowoc, Wisconsin, and her father is Rudolph Eule, Chicago, Illinois.

3. That said Rudolph Eule repeatedly struck Debra Eule when she was less than one year old, and that he repeatedly swore and shouted at her.

4. That said Rudolph Eule has failed to provide Debra Eule with any money or support since March, 1957.

5. That in February, 1959, Rudolph Eule was employed as President and Treasurer of Tri-Ab Inc., an Illinois corporation, in Chicago, Illinois.

6. That notice of this hearing was duly given to Rudolph Eule by registered mail and by publication once a week for three weeks, and I find as

CONCLUSIONS OF LAW

1. That the legal settlement of Debra Eule is in Waukesha County, and that said Debra Eule is a resident of Waukesha County.

2. That all rights of the parent, Rudolph Eule, should be terminated forthwith.

3. That this court has exclusive jurisdiction to terminate parental rights.

4. That Rudolph Eule, although financially able, has substantially and continuously, over the past two years, neglected to provide Debra Eule, a minor, with necessary subsistence, education, and other care necessary for her health, morals and well-being.

Let judgment be entered accordingly.

Dated at Waukesha, Wisconsin, this 2 day of July, 1959.

BY THE COURT:

(S) DAVID L. DANCEY
Juvenile Court Judge.